

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

DALLAS INDEPENDENT SCHOOL DISTRICT,
Cross-Petitioner,
v.

NORMAN JETT,
Respondent.

**REPLY TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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NO. 88-214

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V.

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REPLY TO CROSS-PETITION FOR
WRIT OF CERTIORARI TO THE
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Respondent Norman Jett has filed his petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Norman Jett v. Dallas Independent School District and Frederick Todd*, 798 F.2d 749 (5th Cir. 1986), supplemented on Petitioner's Suggestion for Rehearing *En Banc*, 837 F.2d 1244 (5th Cir. 1988). Jett's Petition was docketed in this Court on June 21, 1988, as Case No. 87-2084. The Dallas Independent School District, Respondent in that case, filed its Reply to said Petition on or about August 18, 1988. The Dallas

Independent School District (hereafter "DISD") also filed a Cross-Petition for Writ of Certiorari on or about July 21, 1988, which was docketed in this Court as Case No. 88-214. Jett submits this Reply to DISD's Cross-Petition.

OPINIONS BELOW

The opinions below are reproduced in the Appendix to Jett's Petition for Writ of Certiorari.

JURISDICTION

The Court has jurisdiction pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant constitutional provisions and statutes are set forth in Jett's Petition for Writ of Certiorari, and DISD's Cross-Petition.

STATEMENT OF THE CASE

The facts and the proceedings below are summarized in Jett's Petition for Writ of Certiorari, DISD's Reply thereto, and DISD's Cross-Petition for Writ of Certiorari.

REPLY TO THE CROSS-PETITION

The liability of DISD under § 1983 is to be determined under the rule of *Monell*. Moreover, if the Court of Appeals opinion is allowed to stand, the *Monell* standard will also control the school district's liability under § 1981.

In applying *Monell* to this case, the Court confronts two issues. The first issue is addressed below. The second issue has been addressed in Jett's Petition for Writ of Certiorari, at pp. 29-30, and that discussion will not be repeated here.

First, was Superintendent Wright an official having "final policymaking authority" in the area of personnel transfers?

Second, was the policy which Wright made and applied to Jett's case, i.e., always "to go with the principal" in any dispute with a teacher, sufficient to trigger governmental liability if it led to an unconstitutional result? Or must *the policy itself* also be unconstitutional?

Although the Fifth Circuit posed the first question, i.e., "whether Wright was shown to be the DISD official responsible for establishing the DISD employee transfer policy", App 23A, it avoided answering it. Instead it answered the second question as follows:

For Wright's actions to have been wrongful, they must either have been based upon Jett's race or on Jett's exercise of his First Amendment rights. That Wright may have acted solely on the basis of Todd's recommendation does not establish either fact, at least where, as here, it was neither found nor established as a matter of law that Wright knew or believed that (or, perhaps, was consciously indifferent to whether) Todd's recommendation was so based.

App. 25A.

Now both Jett and DISD have petitioned for certiorari with regard to these quesitons.

Was Superintendent Wright a policymaker?

The District Court found that the Dallas ISD Board of Trustees had delegated sole and unreviewable authority to the Superintendent to "reassign" members of the coaching staff. App. 47A. Two circuits have held that these facts alone are sufficient to make an official into a "policymaker." See *Neubauer v. City of McAllen, Texas*, 776 F.2d 1567, 1573-74 (5th Cir. 1985), and *Williams v. Butler*, 802 F.2d 296 (8th Cir. 1986).

Whether this fact in and of itself would be sufficient to satisfy *Pembauer's* "policymaker" requirement is the crux of the disagreement between the plurality and concurring opinions in *Praprotnik*. The plurality held that federal courts "would not be justified in assuming that municipal policymaking authority lies somewhere other than where applicable law purports to put it." 106 S.Ct. 925. Thus, for a court to conclude that a final decision-maker was also a "policymaker", it would have to find an express grant of policymaking power in "state law (which may include valid local ordinances and regulations)". *Id.*, at 924.

Of course, the plurality recognized that "special difficulties" arise when "a municipal policymaker has delegated his authority to another official." *Id.*, at 925. It obviously will not do if "a city's lawful policymakers would insulate the government from liability simply by delegating their policymaking authority to another." *Id.* The plurality solves part of the problem by assuring us that "egregious" cases can be dealt with if they rise to the level of a "custom or usage" having the "force of law." *Id.*, at 925-926. Still, as the concurring opinion points out, that leaves a "gaping hole" between cases in which policymakers are designated by statute or ordinance and those in which policy is customarily promulgated by unofficial policymakers. *Id.*, at 934-935 (Brennan, J., concurring). The plurality assures us that there are ways to fill the

"gaping hole." *Id.*, at 927. Unfortunately, we are never told just what those ways are.

Certainly the question of finality is involved. The plurality ultimately rejects Praprotnik's claims because Director Hamsher's decisions were subject to some kind of limited review by the St. Louis Civil Service Commission, *Id.*, at 926-927, a notion which the concurrence rejects. *Id.*, at 935. The concurring opinion, on the other hand, seems moved by the fact that Hamsher never "purported to institute or announce a practice of general application concerning transfers", *Id.*, at 933, and the plurality also seems to consider this fact important.

In our case both of these elements are present. Under Texas statutes the Dallas ISD Board of Trustees had official policymaking powers. See DISD's Reply to Jett's Petition, p. 3, and its Cross-Petition, p. 7. The District Court, however, found that the Board had delegated "sole and *unreviewable* authority to the Superintendent to 'reassign' members of the coaching staff." App. 47A (emphasis added). Moreover, Superintendent Wright testified that he had, in fact, promulgated policies to deal with transfer cases, one of which — always siding with the principal — directly led to Jett's dismissal. App. 4A.

We submit that if the "gaping hole" that appeared in *Praprotnik* is to be filled, these facts must be addressed. Both sides seek certiorari on this issue, and to reject our pleas will only further cloud this already troubled area.

CONCLUSION AND PRAYER

Jett's Petition for Writ of Certiorari should be granted. DISD's Cross-Petition for Writ of Certiorari should be denied or, alternatively, granted conditionally upon the granting of Jett's Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three (3) copies of the above and foregoing Reply to Cross-Petition for Writ of Certiorari have been served upon Mr. David Townend, counsel of record for Cross-Petitioner Dallas Independent School District, at his mailing address, 1302 West Miller Road, P.O. Box 472286, Garland, Texas 75047, on this the 14 day of October, 1988.


SHANE GOETZ